89-804

CASE NO. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STATE OF MINNESOTA,

Petitioner

vs.

ELI A. HERSHBERGER, et al.,

Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether forcing the Old Order Amish in southern Minnesota to use the orange fluorescent or black triangular slow-moving vehicle symbol on their horse-drawn vehicles violates the free exercise clause of the first amendment to the United States Constitution?

(2) Whether the Minnesota Supreme Court 7-0 unanimous decision, that the Minnesota slow-moving vehicle emblem statute as applied to the Old Order Amish violates the free exercise clause of the first amendment to the United States Constitution, constitutes an establishment of religion prohibited by the first amendment to the United States Constitution?

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JURISDICTION

The Minnesota Supreme Court, by unanimous decision filed August 18, 1989, held that Minnesota Statute Section 169.522 (1988), mandating display of triangular reflective identification emblems on slow-moving vehicles during operation on the public highways, violates the rights afforded the Amish by the free exercise clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Statute 169.522 (Subd. 1):

(a) All animal-drawn vehicles, motorized golf carts when operated on designated roadways pursuant to section 169.045, implements of husbandry and other machinery including all road construction machinery, which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving vehicle emblem except when being used in actual construction and maintenance work and traveling within the limits of a construction area which is marked in accordance with requirements of the manual of uniform traffic control devices, as set forth in section 169.06. The emblem shall consist of a fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a

distance of not less than 600 feet to the rear. When a primary power unit towing an implement of husbandry or other machinery displays a slow-moving vehicle emblem visible from a distance of 600 feet to the rear, it shall not be necessary to display a similar emblem on the secondary unit. After January 1, 1975 all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. The commissioner of public safety shall adopt standards and specifications for the design and position of mounting the slow-moving vehicle emblem. Such standards and specifications shall be adopted by rule in accordance with the administrative procedure act. A violation of this section shall not be admissible evidence in any civil cause of action arising prior to January 1, 1970.

(b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:

(1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise,

and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and

(2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red.

Minnesota Rule 7440.0350:

Subpart 1. Conflicting beliefs. Persons who have sincerely held religious beliefs prohibiting their use of the standard SMV emblem may apply for a permit to display the alternate SMV emblem.

Subpart 2. Application. Applications for permits to display the alternate SMV emblem must be made on an application form prescribed by the commissioner. The application must contain a statement of the conflicting religious principles or tenets on which the applicant's objection to the display of the standard SMV emblem is based.

Subpart 3. Permit use requirements. The alternate SMV emblem may be used only on animal-drawn vehicles. A person operating a vehicle displaying the alternate SMV emblem must have in possession in the vehicle a permit or copy of a permit to display the alternate SMV emblem. A permit is not transferable and may not be used by persons other than employees or immediate household members of the

family of a person who has obtained a permit. The permit must be displayed to a peace officer upon request.

Subpart 4. Permit life. A permit for the display of the alternate SMV emblem is valid for a period of four years.

Subpart 5. Appeal. The decision granting or denying permit requests must be in writing and must set forth the reasons for the action. A person whose application is denied may request a contested case hearing to review the denial, by writing to the commissioner of public safety.

STATEMENT OF THE CASE

On October 26, 1988, the Honorable Clement H. Snyder, District Court Judge of the Third Judicial District, County of Fillmore, State of Minnesota presided over a hearing on the Amish defendants' motion to dismiss criminal charges on the grounds that Minnesota Statute Section 169.522 violated the defendants' constitutional rights protected by the free exercise clause of the first amendment of the United States Constitution and Article 1 Section 16 of the Minnesota State Constitution. Trial Judge Snyder denied the Amish defendants' motion to dismiss and held the statute to be constitutional under the U. S. and the Minnesota Constitutions in his December 19, 1988 Order.

Upon request of defense counsel and prosecuting attorney, Judge Snyder certified the matter to the Minnesota Court of Appeals as an important or doubtful question.

On January 5, 1989, the Honorable Donald D. Wozniak, Chief Judge of the State of Minnesota Court of Appeals, ordered the certification of the appeal to the Minnesota Supreme Court for decision. On January 19, 1989, the Minnesota Supreme Court approved the certification transferring the matter to the Minnesota Supreme Court.

On August 18, 1989, the Minnesota Supreme Court in a unanimous (7-0) decision held that Minnesota Statute Section 169.522 (1988), as applied to individuals who entertain sincerely held religious beliefs prohibiting their

compliance therewith, violates the right afforded to them by the free exercise clause of the United States Constitution.

The County of Fillmore is petitioning the United States Supreme Court for a Writ of Certiorari alleging that 1) the Minnesota Supreme Court decision was incorrect in its understanding of free exercise of religion and 2) the Minnesota Supreme Court's decision violates the establishment clause of the United States Constitution.

ARGUMENT

The unanimous decision (7-0) of the Minnesota Supreme Court is correct. It does not conflict with any decision of the United States Supreme Court or decision of any state court which has ruled on similar facts. Further review is unwarranted.

1. It must be noted that Minnesota Attorney General Hubert Humphrey III, in his capacity as Minnesota Attorney General, has not petitioned the United States Supreme Court for review. The petition has been filed by Fillmore County Attorney Robert R. Benson in his capacity as a County Attorney of the State of Minnesota. Minnesota Attorney General Hubert Humphrey III did not brief nor argue the case on behalf of the State of Minnesota in the Minnesota

Supreme Court. This is unusual. In cases in which the constitutionality of a Statute of the State of Minnesota is questioned, the Attorney General typically represents Minnesota. The respondents can only assume the Minnesota Attorney General does not think this case should be appealed.

2. The decision of the Minnesota Supreme Court was a unanimous (7-0) decision. It is entirely consistent with every court in every state which has dealt with the Amish and the slow moving emblem highway sign. In each of these cases, every court has ruled for the Amish. See State v. Swartzentruber, 429 N.W.2d 225 (Mich. App. 1988). Commonwealth v. Zook, No. 85-T-264 (Baron Count District, Ky., Aug. 3, 1985); Fussner v. Smith, No. C-76-363,

N.D. Ohio (Nov. 28,1977); State v. Weaver, No. 77-TR-D-364, Holmes County Ct., Ohio (Sept. 7, 1977).

3. The Minnesota Statute as applied to individuals who hold a sincere religious belief violates the free exercise of religion of the first amendment of the United States Constitution.

Sherbert v. Verner, 374 U.S. 398 (1963), Wisconsin v. Yoder, 406 U.S. 205 (1972), and United States v. Lee, 455 U.S. 252 (1982) provide the federal test to measure when a state regulation may burden free exercise of religion. Under the test, it is necessary to inquire:

(1) Does a genuine religious claim exist?

(2) If so, does the application of the statute infringe upon the free exercise of that religious claim;

(3) If it does, is that

infringement justified by a compelling state interest not realizable by less restrictive means?

The Minnesota Supreme Court held it was proven that these 14 particular defendants hold a genuine sincere religious belief that the orange fluorescent and/or black triangle were worldly symbols so that forced use of such worldly symbols violates their religious beliefs. The Court also held that "as applied to individuals who entertained [such] sincerely-held religious beliefs" Minnesota Statute 169.522 (1988) violated the free exercise clause of the United States Constitution. In other words, not only were the free exercise rights of the 14 named individuals violated, but any other individuals who entertain sincerely-held religious beliefs

concerning this matter also have their free exercise rights violated.

4. The Minnesota Supreme Court held there are less restrictive alternatives available to requiring the Amish to use a fluorescent orange or black triangular worldly symbol. The Minnesota Supreme Court took judicial notice that the State's concern for public safety on the highways is a legitimate compelling state interest. The Court held "the State's compelling public safety interest can be served by a less restrictive alternative." In holding there is a less restrictive alternative available to Minnesota Statue § 169.522 (1988) and Rule 7440.0350, the Court said:

> "We conclude that the state's public safety interest would not be significantly diminished were it to permit the use at night of silver

> reflective tape used in connection with the display of lighted red lanterns by these appellants and by those that are entertaining religious beliefs similar to those of these appellants, ...and that, therefore, it has failed to establish that a less restrictive alternative would not serve its public safety concerns."

The Amish agree with the Minnesota Supreme Court. The State does have a compelling State interest in the safety of the public on the highways. The Amish also agree with the Minnesota Supreme Court's holding that the outlining of the horse-drawn vehicles by silver reflective tape plus the use of the traditional red lantern is a less restrictive alternative to requiring the Amish to use the worldly symbol of a fluorescent orange or black triangle. The State's compelling interest is protected while the Amish' free exercise rights are accommodated by the Minnesota

Supreme Court decision.

5. The County of Fillmore in its Petition For Writ of Certiorari seems to be arguing that because the Minnesota Supreme Court held (1) that the Amish have a genuine sincere religious belief that the use of these worldly symbols violates their religion and (2) that there is a less restrictive alternative to achieving the State's compelling State interest then ipso facto the Minnesota Supreme Court decision establishes religion. Fillmore County is incorrect in its understanding of establishment of religion. Because a statute or a case grants an accommodation for a sincere religious belief does not ipso facto establish religion. Fillmore County in its Petition [Page 19] states:

> "Any court, in attempting to accommodate the free exercise of religion, must address the natural antagonism between the protection of the free exercise clauses and the prohibition constraining state religious involvement as set forth by the establishment clause." [Emphasis added]

Fillmore County misunderstands the two religion clauses in the first amendment. There is not a "natural antagonism"; rather the two clauses reinforce one another. Courts simply attempt "to find a neutral course between the two religion clauses." Walz v. Tax Commissioner, 397 U.S. 664, 668-69 (1970). In attempting to reconcile the two clauses the United States Supreme Court has acknowledged the importance of a zone of accommodation. This zone of accommodation recognizes that government actions impinge on

different persons in dramatically different ways. Truly even-handed treatment at times compels accommodating those whose religious beliefs are exceptionally burdened by a challenged state action. L. Tribe, American Constitutional Law, 2d, 1168 (1988). Accommodation does not include practices whereby government affirmatively supports or endorses a particular religion.

Legislatures as well as courts are free to make accommodations. See, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 107 Supreme Court 2862, 2869 (1987) "there is ample room for[legislative] accommodation of religion under the establishment clause"; Wallace v. Jaffrey, 472 U.S.

38, 83 (1985), O'Connor, J. concurring in judgment, "the term accommodation is the practice or policy whereby government steps aside or creates an exemption in order to produce free exercise neutrality." The first amendment does not prohibit or mandate religion. It prohibits establishment and mandates tolerance of free exercise. Thus, the free exercise clause sometimes requires a state to accommodate religion. Thus, for example, Thomas v. Review Board, 407 U.S. 707 (1981) the State was required to exempt from unemployment benefit regulations a Jehovah Witness who quit his job in a weapons foundry because of a sincerely-held religious belief.

The Supreme Court may create a free exercise exemption for people who

religiously oppose war, Thomas v. Review Board, supra; Congress may require that the land worshiped by Native Americans be left unspoiled, see 42 U.S. Code Section 1996; and a City may prohibit bars within a certain distance of churches, Larkin v. Grendel's Den, Inc. 459 U.S. 116 (1982). None of these accommodations of religion violate the Establishment Clause.

Government violates the establishment clause only if its actions are born of religious intent, or if they exert primarily religious effects, or if they create excessive church/state entanglement. Accommodating religion to permit the free exercise thereof does not automatically establish religion as Fillmore County argues. In several cases, the Supreme Court has required

that personal choices born of religious motivations be exempted from otherwise valid and formally neutral state requirements. In Sherbert v. Verner, 374 U.S 398 (1963) the Court required the State to make unemployment benefits available to Seventh-Day Adventist who for religious reasons refused to work on Saturdays. Thomas v. Review Board 450 U.S 707 (1981) reaffirmed and extended Sherbert. Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1987) reaffirms Sherbert by yet again, applying it to a recent convert to the Seventh-Day Adventist Church. In Wisconsin v. Yoder, supra, the Court, mandated a free exercise exemption law. Yoder exempted the Amish from Wisconsin's law requiring school

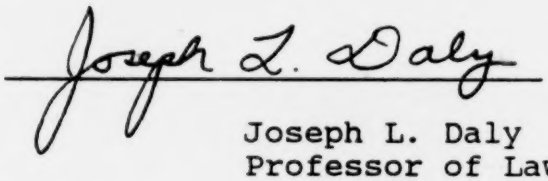
attendance, because the law would have gravely jeopardized the religions very survival.

There is ample room for legislatures and courts to craft religious accommodations and yet not establish religion. The natural result of tolerating religion as broadly as possible is accommodation. That is precisely what the Minnesota Supreme Court has done. It has not established religion by allowing the Amish to use reflective tape and the traditional red lantern on their buggies instead of forcing them to use an orange fluorescent or black worldly symbol. Let the Amish "be not conformed." Romans 12:2.

CONCLUSION

The Petition For Writ Of Certiorari requested by the County of Fillmore, the State of Minnesota should be denied.

Respectfully submitted,



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